In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-970

EARL KUHNS and RICHARD CASTNER, *Petitioners*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California, First Appellate District, Division One

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First Appellate District, Division One

Petitioners, Earl Kuhns and Richard Castner, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division One, entered in the above-entitled case on September 8, 1976.

OPINION BELOW

The September 8, 1976, opinion of the California Court of Appeal is contained in Appendix A.

JURISDICTION

The judgment of the California Court of Appeal (Appendix A) was entered on September 8, 1976. Thereafter a timely Petition for Hearing before the California Supreme Court was filed. That Petition was denied on November 4, 1976, without hearing. (Appendix B).

This petition is timely filed within ninety days of November 4, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. In an obscenity prosecution of a bookstore owner and his clerk not shown to have any connection with the creator or publisher of the matter in question, is it constitutionally permissible to instruct the jury that the financial motives of the creator of the material could be considered evidence that the matter was "obscene"?

2. Does the California obscenity law on its face and as here construed and applied deny bookstore owners and their clerks their free speech and due process rights because it fails to tell them what behavior they may engage in regarding the sale of matter with sexual content and what responsibility they have for the conduct of others in the chain of production and distribution over whom they have no control?

3. Was it constitutionally proper to instruct the jury on a "pandering" theory where there was no evidence that either petitioner commercially exploited the alleged prurient appeal of the matter in question?

4. Does the California obscenity law as here construed deny a bookstore owner and his clerk their free speech and due process rights by permitting the social value of the matter in question to be determined by the motives and behavior of the creator and publisher of the matter, with whom they have no connection?

5. May a bookstore *clerk* be constitutionally convicted of a violation of a state obscenity law when the only evidence of his behavior was that he worked in a store which carried matter of sexual interest and that he knew that a picture of sexual behavior was in a magazine sold by another?

6. Does error affecting First Amendment rights require reversal unless such error can be found to be harmless beyond a reasonable doubt?

7. Does California Penal Code Section 311.2, of which petitioners stand convicted, invidiously discriminate against bookstore owners and their clerks, and thereby deny them equal protection of the law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I, provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exer-

cise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, provides, in material part, that:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. California Penal Code Section 311.2, at the time of the alleged offenses, provided that:

> (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.
>
> (b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place where he is so employed.

4. California Penal Code Section 311 provides that:

> As used in this chapter:
>
> (a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.
>
> (1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.
>
> (2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.
>
> (b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion pic-

ture, or other pictorial representation or any statue, or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

STATEMENT OF THE CASE

On February 4 and 14, 1971, amended complaints were filed in the Municipal Court of the Santa Cruz County Judicial District, County of Santa Cruz, charging each Petitioner with a total of three counts of violation of Penal Code Section 311.2 (distribution and exhibition of obscene matter). Petitioners entered pleas of not guilty to the charges.

The charges resulted in two separate jury trials. The first trial which took place in May, 1971, concerned the magazine "Response, the Photo Magazine of Sex for Women." The case bore the numbers CR24014 and CR24015 in the Municipal Court, and bore docket number 48 in the Appellate Department. As a result of the convictions in this trial, Petitioner Kuhns received a sentence of 90 days, one day suspended, and was fined $1,250.00. Petitioner Castner was sentenced to 40 days and was fined $625.00.

The second trial took place in September and October, 1971, and involved two books entitled "Animal Lovers" and "Sex and the Teenager." The case bore the numbers CR24034, CR24035, CR24142, and CR24143 in the Municipal Court, and bore docket numbers 58, 59, 60 and 61 in the Appellate Department. As a result of these convictions, Kuhns was given 180 days, one day suspended, concurrent sentences and fined $1,250.00 on each count ($2,500.00 total). Castner was given 90 day concurrent sentences and fined $625.00 on each count ($1,250.00 total).

On November 9, 1972, the Appellate Department of the Santa Cruz County Superior Court simultaneously affirmed the judgments of conviction. Petitioners remained on bail while they filed a Petition for Writ of Certiorari before this Court. Following the decision in *Miller v. California,* 413 U.S. 15, [rehearing den. 414 U.S. 881], the Petition for Certiorari was granted, the judgment of the Appellate Department was vacated and the matter was remanded to the Appellate Department for further consideration in light of *Miller v. California, supra. Kuhns v. California,* 413 U.S. 913.

Upon reconsideration, the Appellate Department of the Santa Cruz County Superior Court again affirmed the judgments. Once again Petitioners petitioned for Writ of Certiorari before this Court. That Petition was denied on the ground that the decision which Petitioners sought to have reviewed was not by the

highest state court in which a decision could be had as required by 28 U.S.C. §1257. *Kuhns v. California,* 419 U.S. 1066.

Upon remand to the Appellate Department, Petitioners moved for recall of the remittitur, relief from default, and to vacate the judgment. On June 3, 1975, an order was filed in the Superior Court by which these motions were granted. By the same order the cause was certified for transfer to the Court of Appeal pursuant to the provisions of California Penal Code Section 1471 and California Rules of Court, Rules 62 and 63.

On July 7, 1975, the California Court of Appeal granted a transfer of the case, and thereafter rendered the opinion set forth in Appendix "A". The convictions of Petitioner Kuhns were affirmed in all respects. The conviction of Petitioner Castner for "Response" was affirmed, but those for "Animal Lovers" and "Sex and the Teenager" were reversed. A timely Petition for Hearing filed with the California Supreme Court was denied without opinion (Appendix B) and this Petition followed.

STATEMENT OF FACTS

I

All of the factual events here relevant occurred inside of Frenchy's K & T Adult Bookstore in Santa Cruz, California. It was stipulated that at all relevant times Petitioner Kuhns was part owner of the book-

store and that Petitioner Castner was only a clerk working in the store (R.T. 2, p. 80).

At all relevant times no person standing outside of the store could see what was inside or on display in the store (R.T. 2, p. 80).

A. The First Trial

On January 2, 1971, a Santa Cruz police officer went to the bookstore and purchased a copy of the magazine "Response, Volume One, Number One." The officer observed hundreds of books and magazines on display, selected one which was encased in plastic and took it to a counter behind which both Petitioners were standing. Petitioner Kuhns accepted payment for the purchase and handed the officer a copy of the magazine which had been obtained by Castner from a cabinet. The officer commented that the cover seemed different from the picture visible in the display copy but Petitioner Castner told him it was the same magazine and the picture was inside. The officer testified that he later found the picture he had inquired about at page seven in the magazine he purchased (RT. 54-68).

Over objection, evidence was presented by the prosecution on the theory of "pandering" to show that the bookstore stocked books, magazines and novelties of sexual character or interest and that some of the magazines in stock, including the one charged, "Response", were displayed in the store wrapped in plastic with a graphic photograph from the magazine visible on the cover (R.T. 69-79).

B. The Second Trial

On January 7, 1971, Officer Kusanovich of the Santa Cruz Police Department entered the bookstore. When the officer entered the store he saw Petitioners standing behind a counter with a cash register on it. The officer tried to engage the Petitioners in conversation. Petitioner Kuhns indicated that they wouldn't talk to him about the contents of the material. The officer indicated strongly that he wanted a book involving animals and humans (R.T. 28).

The officer looked around the store and selected a book which appeared to be concerning animals and humans called "Animal Lovers". At the time the officer selected the book, the book was totally wrapped in cellophane, and had on the cover a photo displaying a dog with its mouth in the area of a woman's sexual organs (R.T. 29-31). The officer took this book up to the counter and asked if there were other similar type books in the store, to which Petitioner Kuhns answered affirmatively, directing him to the appropriate area. Kuhns also replaced the cellophane-wrapped book with another copy of the book, taken from the rear of the store (R.T. 33).

At the time the purchase was made, there were over 2,000 books displayed in the store (R.T. 47-49). The condition and appearance of the store was once again shown to the jury through photographs, by the prosecution, on a pandering theory, and over objection.

Another officer testified that on February 4, 1971, he entered the same bookstore and purchased a copy of "Sex and the Teenager". Petitioners Kuhns and Castner were both at the store and Petitioner Kuhns handled the entire transaction except for the fact that Petitioner Castner put the books in a bag (R.T. 68).

II

On the issue of "pandering" the jury at each trial was instructed in the language of California Penal Code Section 311(a)(2), which is California's "pandering" law. See p. 5, *supra.*

Even though a bookseller and his clerk were the only persons on trial, the jury at the first trial involving "Response" was further told that circumstances of *production* and dissemination were relevant in determining whether social importance claimed for the material was pretense or reality. The jury was further instructed that if they found the purveyors' sole emphasis was upon *the sexually provocative aspects of the publication, that fact alone* could justify the conclusion that the matter was utterly without redeeming social important (R.T. 513). See Appendix A, p. xviii, fn. 4 and p. 18, *infra.*

The jury was further instructed without qualification or specificity that if the object of the work were material gain for the *creator,* through an appeal to the sexual curiosity and appetite, such facts could be considered evidence that the work was "obscene". (Ibid.). Appendix "A", fn. 5 and p. 18, *infra.*

No instruction advised the jury what was required to make a defendant either a principal or an aider and abettor under California law.

At the second trial, involving "Animal Lovers" and "Sex and the Teenager" the jury was further told that if the sole emphasis of the *matter* was on its sexually provocative aspects, *that fact* could justify the conclusion that the matter was utterly without redeeming social importance.

HOW THE FEDERAL QUESTIONS WERE RAISED

1. Petitioners asserted that California "pandering" law, Penal Code Section 311(a)(2) was unconstitutional on its face and as applied to them because it denied them free speech and due process rights.

At the first trial (Response) the issue was raised by demurrer, which was overruled (C.T.), by objections to instructions (R.T. 518) and on appeal (Appellants' Brief 3-13 [hereafter "AB"]).

At the second trial, the issue was raised by demurrer which was overruled (C.T.), motion to acquit, which was denied (R.T. 333-36; C.T.); objections to instructions (R.T. 339-45, 362) and on appeal (AB 3-13).

2. Petitioners specifically asserted that P.C. §311.2 denied them equal protection by demurrer (C.T.) by motions to acquit (R.T. [Response] 381-5; R.T. 333-6) and on appeal (AB 17-25).

3. Petitioners urged that their convictions be reversed on appeal and raised the issue of what constituted the appropriate standard for judging whether error required reversal by Petition for Hearing before

the California Supreme Court, after finding that the Court of Appeal had applied the wrong test.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Recent decisions of this Court have both decided old issues and set forth new guidelines regarding resolution of the question of the obscenity of particular items dealing with sex. But neither *Miller v. California,* 413 U.S. 15, nor any of its siblings nor progeny focus upon the permissible scope of behavior of bookstore owners and employees when they deal with material with sexual content. No case has yet advised bookstore owners and employees of the appropriate scope of their sales activity, or their responsibility for the motives and behavior of others in the communication chain.

The Court's recent grant of Certiorari in *Splawn v. California,* No. 76-143, *cert. granted* 12-6-76, indicates that it is now prepared to give retailers some guidance regarding those issues.

This case raises the same central issues as *Splawn v. California, supra.* However, as this case involves a clerk, with no ownership interest in his place of employment, this case provides a different perspective from which the issues can be approached.

This case thus provides the Court with an additional opportunity to focus upon the statutory and behavioral criteria relevant to a determination of the rights

and responsibilities of bookdealers and their employees and thus ultimately to a determination of the rights of citizens to receive material with sexual content.

I

REVIEW SHOULD BE GRANTED TO CORRECT THE MISAPPLICATION OF THIS COURT'S "PANDERING" DOCTRINE TO PETITIONERS AND TO SET FORTH THE MANNER IN WHICH THIS DOCTRINE IS TO BE APPLIED TO BOOKSELLING.

A.

1.

This Court's "pandering" doctrine, set forth in *Ginzburg v. United States,* 383 U.S. 463, permits fact finders, in judging whether material is obscene, to look beyond the four corners of the material to the behavior of persons who deal with the material. The doctrine, however, has its limitations: it applied only to commercially *exploitive* behavior by *those on trial.* If it is applied otherwise, it then undermines the constitutional requirements which have been declared to be the minimum criteria necessary to censure sexual materials, and it violates due process by condemning persons for the behavior or motives of those with whom they have no connection.

In Petitioners' first trial, after a police officer made his selection of "Response", Kuhns, the owner of the store, took his money and gave him a copy of the magazine. Castner, the clerk, did nothing; he merely responded to an unsolicited question by the police

officer. Kuhns made a sale without more. Castner gave requested information, nothing more. There was no evidence that Castner had any control of what material was placed in the store or how it was displayed or sold.

In the second trial, during the purchase of "Animal Lovers", when asked if there were books similar to one chosen by the officer, Kuhns directed him to an area of the store. Other than that, Kuhns refused to discuss anything with the officer. Kuhns gave the officer a copy of the book and took his money. Regarding "Sex and the Teenager", nothing happened except a simple sale, handled by Kuhns.

It is difficult to conceive how this behavior can be interpreted as commercial exploitation of the material involved by the defendants. It appears to be simple sale activity.

"Pandering" doctrine, when applied, significantly changes the nature of an obscenity trial and can only work to a defendant's detriment. Before defendants are subject to this additional level of attack in the obscenity area, there must be a requirement that evidence exist which warrants the application of the "pandering" doctrine, in order to avoid serious due process infirmities, cf. *Thompson v. Louisville,* 362 U.S. 199; cf. *Garner v. Louisiana,* 368 U.S. 157; cf. *Barr v. Columbia,* 378 U.S. 146. Otherwise, the pandering doctrine is being applied overbroadly and unconstitutionally. *Gooding v. Wilson,* 405 U.S. 518; *Erznoznik v. Jacksonville,* 422 U.S. 205.

2.

The application of the "pandering" doctrine to the question of Castner's guilt or innocence resulted in a significant due process abuse.

Whatever the merits of the pandering instructions given by the trial court, they should never have been made applicable to the question of defendant Castner's guilt or innocence.

The Court of Appeal, p. xxii, Appendix "A", held that Castner was responsible for, and could be judged with respect to, the circumstances of presentation, sale, dissemination, distribution and publicity solely because he was "cognizant" of them. This flies in the face of the well established rule, recognized by the Court of Appeal at p. xxx, that mere knowledge or presence at the scene of a crime neither constitutes a crime nor aiding and abetting a crime.

In case no. 48, involving "Response", which is the only case of which Castner now stands convicted, there is no evidence that Castner, a mere clerk in the store, had any control over, or had anything to do with the presentation or publicity in the store or respecting the magazine in question. Regarding the circumstances of sale (or dissemination or distribution) all the evidence shows only that Castner answered a question regarding the magazine and took the money for it.

No instruction advised the jury that Castner could be found guilty as an aider and abettor or as a conspirator.

Thus, there is no evidence that the magazine, "Response", was in the language of the statute and the instruction, "being commercially exploited by the defendant" Castner. It therefore constitutes a denial of due process to apply pandering law and instructions to Castner.

The most serious vice of the holding is its chilling effect upon the exercise of First Amendment activity by those who wish to work in bookstores. In fact, the opinion as written places serious pressures on all bookstore personnel because it makes all employees responsible for all of their store's displays, publicity and sales techniques, irrespective of the degree of control exercisable by the employee.

Certiorari should be granted to correct this serious error.

B.

In case number 48, involving "Response", the jury was instructed that

> In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of production, presentation, sale, dissemination, distribution, or publicity and, particularly, whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without social importance. The weight, if any, to which such evi-

dence is entitled is a matter for the jury to determine. (R.T. 512-513)

Circumstances of *production* and dissemination are relevant to determining whether social importance claimed for material was pretense or reality. (R.T. 513)

If you conclude that the *purveyor's* sole emphasis is on the *sexually provocative aspects* of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance. (R.T. 513)

If the object of the work is material gain *for the creator* through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, *this may be considered evidence that the work is obscene.* (R.T. 513) (emphasis supplied)

In case numbers 58-61, involving "Animal Lovers" and "Sex and the Teenager", the jury was instructed that

> Where circumstances of production, presentation, sale, dissemination, distribution or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. (381)

The Court, however, went much further than P.C. §311(a)(2) and also instructed the jury that:

> Circumstances of presentation and dissemination are relevant to determine whether social importance claimed for material was in the circumstances pretence or reality. If you conclude that the sole emphasis *of the matter* is on its *sexually provocative aspects,* that fact can justify the conclusion that the matter is utterly without redeeming social importance. (381)

These instructions are quite similar to those given in *Splawn v. California,* No. 76-143, *cert. granted* 12-6-76, Pet. for Cert. p. 9.

The instructions here suffer from the same infirmities as those in *Splawn:*

1. They permit findings on the obscenity of material to be governed by the motives and behavior of persons who were not on trial.

2. They focus on "provocativeness" and "gain for the creator" as criteria for determining obscenity, when those standards have no place in the constitutional doctrine.

3. They render the definition of obscenity so ambiguous that dealers cannot receive fair notice of what is prohibited.

4. They make defendants responsible for the conduct of others with whom they have no connection and over whom they have no control.

These defects denied Petitioners their First Amendment rights to disseminate non-obscene matter and their due process rights to be tried on the basis of their own behavior. Unless this Court corrects these errors, others similarly employed will be similarly mistreated.

II

CERTIORARI SHOULD BE GRANTED TO SET FORTH THE PROPER STANDARDS BY WHICH TO JUDGE WHEN ERROR AFFECTING FREE SPEECH AND DUE PROCESS RIGHTS REQUIRES REVERSAL.

Some, but not all, of the instructions on pandering which Petitioners urged as erroneous were found to be error by the Court of Appeal, although no specific basis appears to be stated by that Court for its holding of error. See Appendix "A", pp. xvii-xxiii. In any event, the Court of Appeal felt that the errors did not require reversal because it concluded that "there was no evidence concerning the manner in which the publications were originally produced." Appendix "A", p. xx. That conclusion was wrong, for the material itself, the fundamental circumstance of production, was in front of the jury. The jury was told to discern the motives of the creator and producer from this material and to use those conclusions as evidence that the material was "obscene". It was further told to judge the material itself by its "sexually provocative aspects."

The reason that these erroneous instructions seriously prejudiced defendants is that they created ambiguity, uncertainty and confusion in the mind of the jury.

The jury was first told about the three elements of obscenity, and was told to judge the material against *those* standards. Having been told that, it was then advised that it should use the "sexually provocative aspects" of the "matter", the "motives" of the "creator", and the "circumstances of production" (of

which the publication itself could be some evidence) to determine if the material was "obscene".

It appears that what the trial Court gave with one hand, it took back with the other. The total impact of all the instructions was, at worst, to mislead the jury, at least to confuse them, and in any event to deny them their constitutional rights.

While the Court of Appeal did not explicitly state which test it was using to determine if the conceded errors warranted reversal, it is obvious that the Court of Appeal applied the normal test of prejudice dictated by California Constitution Article VI, Section 13. Under this test, no reversal is warranted unless "it is reasonably probable that a result more favorable . . . would have been reached in the absence of the error(s)." *People v. Watson,* 46 C.2d 452; *People v. Leach,* 15 C.3d 419. That test appears to be the one applied by California Courts to errors in obscenity cases, see *People v. Williamson,* 207 C.A.2d 839.

In the case at bar, the jury, as in all obscenity cases, was required to make a difficult and complex set of judgments to determine whether the material was obscene. Even under the best drawn instructions it is difficult to convey to a jury what is required in an obscenity prosecution. And, of course, what is required is usually, as here, constitutionally required. Therefore a strict standard of review should be applied in obscenity cases.

Here, the errors in the instructions had a destructive impact on two of the defendants' constitutional rights. First, their due process rights to be judged

by their own behavior rather than those with whom they had no connection were seriously undermined. Second, their first amendment rights to have the obscenity of the material judged by the required constitutional standards (rather than the circumstances of production, the motives of the creator and the sexual provocativeness of the material) were effectively nullified.

Thus, the nature and impact of the errors in this case warrant reversal *per se,* because the errors fundamentally affect the question of the petitioners' guilt or innocence, see, e.g., *Glasser v. U.S.,* 315 U.S. 60; *Gideon v. Wainwright,* 372 U.S. 335; *Ballenbach v. U.S.,* 326 U.S. 607. Precisely because the errors go to the question of whether the material is obscene and whether petitioners' conduct is culpable, a *per se* rule is appropriate. *Chapman v. California,* 386 U.S. 18 at 44, fn. 2, Stewart, J., concurring.

In any event, because the errors here conceded are of federal constitutional dimensions, the minimum test which can be applied is that dictated by *Chapman, supra:* reversal is required unless the reviewing court is regarding the error "able to declare a belief that it was harmless beyond a reasonable doubt." *Id.,* at 14.

Certiorari should be granted to clarify that obscenity cases are to be governed by a strict standard of review.

III

PENAL CODE SECTION 311.2, AS APPLIED TO PETITIONERS, INVIDIOUSLY DISCRIMINATES AGAINST BOOKSTORE CLERKS AND OWNERS, THUS DENYING PETITIONERS EQUAL PROTECTION OF THE LAW.

At the time of the trials herein, Penal Code, Section 311.2 excluded from criminal liability a motion picture operator or projectionist of a film when he has no financial interest in his place of employment. Penal Code Section 311.2(b).

It left a necessary employee of a theater free from potential penalty but allowed the prosecution of a clerk who sold a book, magazine or film, rather than showing a film.

Such a classification appears to be without justification. In any event such a classification clearly burdens those who would deal in books and magazines, or sell rather than project films.

When a classification is challenged as affecting the exercise of fundamental First Amendment freedoms, it must be shown by the State to be necessary to promote a compelling state interest and to be drawn so as to achieve its object without unnecessarily burdening or restricting constitutionally protected activity. See, e.g., *Sherbert v. Verner,* 374 U.S. 398, 406; *Shelton v. Tucker,* 364 U.S. 479, 488; cf. *Dunn v. Blumstein,* 405 U.S. 330.

If California's purpose was to protect "innocent" employee operators or projectionists it had no constitutionally permissible basis for refusing that same

protection to employee retail clerks who would, by hypothesis, have even less knowledge of the content of the goods they handled than a projectionist and certainly would have less knowledge and control than a motion picture operator. Indeed, it is difficult to imagine a *compelling* state interest promoted by California's discriminatory statute.

The evidence and stipulations make it abundantly clear that Castner was merely a clerk during the transactions. Yet his behavior, under the statute, makes him subject to conviction when those with more potential involvement, movie operators, and those with similar functions, projectionists, are immune. This discrimination, lacking a compelling justification, deprived Castner of equal protection of the law and requires reversal.

Projectionists can exhibit regardless of their degree of control over the exhibition. As "exhibition" presumably covers all their necessary job functions, they are free from all prosecution.

Operators can exhibit regardless of their degree of control. Thus, operators are free to manage or otherwise run theaters any way they please. They can advertise and they can pander, and still not be subject to prosecution.

Bookstore clerks, on the other hand, cannot exhibit, or distribute, which means that they are liable for prosecution for doing the obvious fundamental acts for which they are hired. As many persons employed by bookstores have duties related to putting

books on the shelves for sale, they in the normal course of their duties are involved in the exhibition of the material and are therefore subject to prosecution. Lastly, a clerk, with specified duties over which he has no control, cannot stand mute and take money for a book or magazine, while a movie operator is free to do as he pleases.

This scheme appears to make no sense. In any event, it invidiously discriminates against bookstore personnel without a compelling state interest and is therefore unconstitutional.

Defendant Kuhns, the operator of the bookstore, was convicted under a statute which classifies those who can be subject to criminal liability by their status as one with a "financial interest" in their place of employment. The statutory scheme is discriminatory; it operates to place burdens upon the book and magazine trade which cannot be justified simply because of its commercial character and the possible financial interests of a potential defendant. See *Ginzburg, supra,* at 474; *New York Times v. Sullivan,* 376 U.S. 254, 265-266; *Smith v. California,* 361 U.S. 147, 150.

Thus, while defendant Kuhns' conduct might be regulated in this field under a more precisely drawn scheme, the statute itself is void on its face and cannot be applied to the operator of a bookstore. See e.g., *Thornhill v. Alabama,* 310 U.S. 88; *N.A.A.C.P. v. Button,* 371 U.S. 415, 432-33; *Baggett v. Bullitt,* 377 U.S. 360, 366.

CONCLUSION

For the foregoing reasons, petitioners urge this Court to grant them a Writ of Certiorari.

Dated, San Francisco, California,
January 11, 1977.

Respectfully submitted,
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(Appendices Follow)

APPENDICES

Appendix "A"

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

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1 Criminal No. 14,439

The People of the State of California,
Plaintiff and Respondent,
vs.
Earl Kuhns and Richard Castner,
Defendants and Appellants.

[Filed Sept. 8, 1976]

OPINION

As a result of a certification, hereinafter detailed, the defendants, despite the establishment of the constitutionality of the statutes under which they were

convicted (Pen. Code, § 311[1] and § 311.2, subd. (a)[2]; see *Bloom v. Municipal Court* (1976) 16 Cal.3d 71),

[1]So far as is pertinent to this review, section 311 of the Penal Code provides as follows:

"As used in this chapter:

"(a) 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

"(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

"(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means being aware of the character of the matter or live conduct.

"(f) 'Exhibit' means to show.

. . . . . ."

[2]Subdivision (a) of section 311.2 provides: "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

seek to press alleged errors to reverse their convictions. We hold that there is no merit to their claims of error in the following fields: (1) the manner in which the jurors who convicted them were selected; (2) the contention that the provisions of paragraph (2) of subdivision (a) of section 311, regarding evidence to establish that the matter is utterly without redeeming social importance, are unconstitutional and were improperly made the subject of an instruction, (3) alleged lack of proof and misdirection of the jury on the issue of *scienter,* (4) alleged discrimination, which denies both the owner and the clerk equal protection of the law, (5) insufficiency of the evidence to establish that the material involved was obscene. We do find that there was insufficient evidence to convict the defendant clerk of two of the three charges of which he was found guilty.

History of the Case

On February 4 and 14, 1971, amended complaints were filed in the Municipal Court of the Santa Cruz County Judicial District, County of Santa Cruz, charging each appellant with a total of three counts of violation of Penal Code section 311.2 (distribution and exhibition of obscene matter). Appellants entered pleas of not guilty to the charges.

The charges resulted in two separate jury trials. The first trial which took place in May 1971 concerned the magazine "Response, the Photo Magazine of Sex for Women." The case bore the numbers CR24014 and CR 24015 in the municipal court, and

bore docket number 48 in the appellate department. As a result of the convictions in this trial, defendant Kuhns received a sentence of 90 days, one day suspended, and was fined $1,250. Defendant Castner was sentenced to 40 days and was fined $625.

The second trial took place in September and October 1971 and involved two books entitled "Animal Lovers" and "Sex and the Teenager." The case bore the numbers CR24034, CR24035, CR24142, and CR24143 in the municipal court, and bore docket numbers 58, 59, 60 and 61 in the appellate department. As a result of these convictions, defendant Kuhns was given 180 days, one day suspended, concurrent sentences and fined $1,250 on each count ($2,500 total). Defendant Castner was given 90 day concurrent sentences and fined $625 on each count ($1,250 total).

On November 9, 1972, the appellate department of the Santa Cruz County Superior Court simultaneously affirmed the judgments of conviction. Appellants remained on bail while they filed a petition for writ of certiorari before the United States Supreme Court. Following the decision in *Miller v. California* (1973) 413 U.S. 15 [rehg. den., 414 U.S. 881], the petition for certiorari was granted, the judgment of the appellate department was vacated, and the matter was remanded to the appellate department for further consideration in light of *Miller v. California, supra.* (*Kuhns v. California* (1973) 413 U.S. 913.)

Upon reconsideration, the appellate department of the Santa Cruz County Superior Court again affirmed

the judgments. Once again appellants petitioned for writ of certiorari before the United States Supreme Court. That petition was denied on the ground that the decision which appellants sought to have reviewed was not by the highest state court in which a decision could be had as required by 28 United States Code section 1257. (*Kuhns v. California* (1974) 419 U.S. 1066.)

Upon remand to the appellate department, appellants moved for recall of the remittitur, relief from default, and to vacate the judgment. On June 3, 1975, an order was filed in the superior court by which these motions were granted. By the same order the cause was certified for transfer to the Court of Appeal pursuant to the provisions of Penal Code section 1471 and California Rules of Court, rules 62 and 63.

On July 7, 1975, this court granted a transfer of the instant case, determining that it involved the same issues then on appeal before the California Supreme Court in *Bloom v. Municipal Court.* Determination of those issues was deferred in anticipation of the filing of the opinion in *Bloom* by the court. (*Bloom v. Municipal Court* (1976) 16 Cal.3d 71.) The *Bloom* opinion was adverse to several of the appellants' claims concerning the unconstitutional vagueness of Penal Code section 311.2.

Thereafter, appellants filed a supplemental brief on appeal. Appellants no longer argue several contentions made below. The cause has been submitted on that brief and respondent's reply.

Facts

On January 2, 1971, Lieutenant Charles Scherer of the Santa Cruz Police Department entered Frenchy's K & T Bookstore in the City of Santa Cruz and purchased a magazine entitled "Response, the Photo Magazine of Sex for Women." Petitioner Castner and petitioner Kuhns were both involved in the transaction, the former producing a copy of the magazine for Scherer, and the latter receiving the lieutenant's money. Kuhns was the owner of the store and Castner was a clerk.

The magazine contained pictures and text that portrayed graphically a broad range of heterosexual and homosexual conduct between adults, including depictions of sexual intercourse and oral sex. The magazine was the basis of the first count of violating Penal Code section 311.2 charged against appellants.

On January 7, 1971, a different Santa Cruz police officer entered Frenchy's K & T Bookstore and requested a book depicting sex between animals and people. Appellant Kuhns indicated an area of the store and the officer eventually obtained and purchased a book called "Animal Lovers." On February 4, 1971, another officer returned to the store and purchased a book entitled "Sex and the Teenager, An Illustrated Study." The two books contained photographs showing heterosexual and homosexual intercourse, oral copulation, and intercourse and sex acts with animals. These books were used for the second and third charge of violating Penal Code section 311.2.

I

At the outset of each action the defendants challenged the entire jury panel on the grounds that it excluded all those persons residing in the judicial district who had been residents for less than one year. It was stipulated that the jury panel had been drawn in compliance with the provisions of section 198 of the Code of Civil Procedure as it then read[3] and thus did in fact exclude such persons. Defendants arguments that their constitutional rights to due process, a fair trial and equal protection of the law had been violated, were rejected and the challenges were overruled. In the action first tried the defendants made the further objection that the panel was drawn only from the list of registered voters, and unconstitutionally denied the defendants of a panel including all other eligible residents who had neglected to maintain their registration.

Their arguments were pressed in briefs filed with the appellate division of the superior court. Defendants now concede that meanwhile the issue, as it arose

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[3]Section 198 then provided in pertinent part:
"A person is competent to act as juror if he be:
"1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned; . . ."
As of March 4, 1972, "18" was substituted for "twenty-one" in subdivision 1. (Stats. 1971, ch. 1748, § 29, p. 3748.)
In 1975 the statute was amended to read in part, "1. A citizen of the United States of the age of 18 years who meets the residency requirements of electors of this state; . . ." (Stats. 1975, ch. 172, § 1, p. ....., No. 2 Deering's Adv. Legis. Service, p. 618, effective Jan. 1, 1976.)

under section 198 as it read at the time of trial, has been resolved against them. In *Adams v. Superior Court* (1974) 12 Cal.3d 55, the majority opinion recites, "The Jury Commissioner of San Diego County seeks writ of mandate compelling respondent superior court to set aside an order declaring Code of Civil Procedure section 198 unconstitutional and directing him to select petit jurors without regard to the section's one-year residency requirement. We conclude the requirement does not violate due process or the equal protection guarantees of the Fourteenth Amendment to the United States Constitution or article I, sections 11 and 21 of the California Constitution." (12 Cal.3d at p. 58, fn. omitted.)

Undaunted, defendants assert that the amendment of section 198 in 1975 (see fn. 3 above) was intended to reduce the residency requirement, and that it should be given retroactive effect, at least in those cases which are not final, where proper objection was interposed before the trial court. They suggest that it should be applied as a procedural change. (See *People v. Bradford* (1969) 70 Cal.2d 333, 343 [change in testimonial privilege, cert. den., 399 U.S. 911]; *People v. Snipe* (1972) 25 Cal.App.3d 742, 745-748 [change in period in which death must ensue to warrant prosecution for homicide]; and *People v. Berumen* (1969) 1 Cal.App.3d 471, 475 [limitation of time of notice of motion to suppress].) The foregoing precedents are not controlling. Section 3 of the Code of Civil Procedure provides, "No part of [this Code] is retroactive, unless expressly so declared." (See also

People ex rel. *City of Bellflower County Water Dist.* (1966) 247 Cal.App.2d 344, 350-351.)

There was no error in denying defendants' challenges to the jury panels.

II

A reading of *Bloom v. Municipal Court, supra,* and the United States Supreme Court decisions referred to therein indicates that the California obscenity statutes as drafted and adopted in 1961 (Stats. 1961, ch. 2147, § 5, pp. 4427-4429, adding Pen. Code, §§ 311-312) incorporate concepts expounded in *Roth v. United States* (1957) 354 U.S. 476 [rehg. den., 355 U.S. 852], and that they were revised in 1969 (Stats. 1969, ch. 249, §§ 1 and 2, pp. 598-599, revising Pen. Code §§ 311 and 311.2) to give full play to principle further developed in *Memoirs v. Massachusetts* (1966) 383 U.S. 413. (16 Cal.3d at pp. 76-77. See also *Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901, 918-920 with reference to 1961 legislation.) At the same time as the court decided *Memoirs* it rendered its opinion in *Ginzburg v. United States* (1966) 383 U.S. 463 [rehg. den., 384 U.S. 934]. The court prefaced its opinion by stating, "In the cases in which this Court has decided obscenity questions since *Roth,* it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the

question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise." (383 U.S. at pp. 465-466.)

The majority of the court opined, "This evidence, in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offiensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test." (*Id.*, pp. 470-471.)

In a more limited sense the opinion states, "We perceive no threat to First Amendment Guarantees in thus holding that in *close cases* evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." (*Id.*, p. 474, fn. omitted, italics added.) It concluded, "It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation." (*Id.*, pp. 475-476.)

The language added in paragraph (2) of subdivision (a) of section 311 in 1969 (see fn. 1 above), unquestionably stems from *Ginzburg*. The principle, however, has been elsewhere recognized. In *Roth v. United States, supra,* Chief Justice Warren, in a concurring opinion, noted: "The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." (354 U.S. at p. 495.) In *Memoirs v. Massachusetts, supra,*

the plurality opinion stated, "On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be *utterly* devoid of social value, but rather that, as we elaborate in *Ginzburg v. United States, post,* pp. 470-473, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value." (383 U.S. at p. 420. See also *Hamling v. Unitied States* (1974) 418 U.S. 87, 130 [rehg. den., 419 U.S. 885]; *People v. Burnstad* (1973) 32 Cal.App.3d 560, 565-566 [overruled on other grounds *People v. Superior Court (Freeman)* (1975) 14 Cal.3d 82, 87]; *People v. Sarnblad* (1972) 26 Cal.App.3d 801, 807; *People v. Stout* (1971) 18 Cal.App.3d 172, 175; *United States v. Dachsteiners* (9th Cir. 1975) 518 F.2d 20, 22-23 [cert. den., (1975) 421 U.S. 954]; and *State v. J-R Distributors, Inc.* (1973) 82 Wn.2d 584, 599 [cert. den. (1974) 418 U.S. 949].)

The paragraph in question reads, "In prosecutions under this chapter, where circumstances of produc-

tion, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance." (Pen. Code, § 311, subd. (a)(2).) Defendants' attack is threefold. They contend that the so-called "pandering" statute is unconstitutional on its face and as applied to the facts of this case; that it was an error of constitutional dimensions to instruct the jury on the use to be made of the evidence and that in any event there was insufficient evidence to warrant the instructions.

A

Although in the appeal from the first trial, defendants suggested that the statutory provisions violated the First Amendment, they confined their attack to the instructions given on the subject of "pandering." On the appeal from the second trial and before this court it is contended that the provisions of paragraph (2), of subdivision (a) of section 311, are unconstitutional because (1) they are overbroad, (2) they compel rather than permit an inference, (3) they erroneously permit inferences to be drawn on other elements of the offense, (4) they permit publications which are not obscene in their origin to be found so, (5) they erroneously permit commercialism to become a factor of the crime, and (6) they are too vague.

Preliminarily we note that the constitutional test is now less stringent than that found in the California law—"whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (*Miller v. California, supra,* 413 U.S. 15, 24), rather than "utterly without redeeming social importance" (see *Bloom v. Municipal Court, supra,* 16 Cal.3d 71, 76-77; and *People v. Enskat* (1973) 33 Cal.App.3d 900, 904 and 910-911 [cert. den. (1974) 418 U.S. 937]). It well may be that defendants' arguments no longer rise to the level of constitutional dignity because the statute is merely a rule of evidence to be judged by ordinary standards of reasonableness. Be that as it may, we find no violation of constitutional principles as expostulated in *Ginzburg* and other cases reviewed above.

We reject the argument that the statute is overbroad because it fails to include the "close cases" limitation mentioned in one quotation from *Ginzburg* (see 383 U.S. at p. 474). As noted in *Ginzburg* and the other cases the evidence is generally relevant in determining the question of obscenity, not only on the factor of social importance, but also in relation to the element of appeal to prurient interest (see 383 U.S. at p. 470). The fact that *Ginzburg* may have been a close case, and that the evidence served to resolve "all ambiguity and doubt" (*id.*) does not indicate that the relevancy, as distinguished from the probative force, is any less in other cases. Nor does *Ginzburg* prescribe that the admission of such evidence, as urged by defendants, is limited to cases involving mailing and advertising as distinguished from the circumstances

surrounding presentation, display and sale in a retail store. Moreover, we note that the defendants, in urging that the matter presented is not obscene on its face, are in effect urging that there is some question as to the nature of the material in question. The danger that the Bible, if improperly exploited, will be considered obscene material is controlled by the necessity of proving the other two elements of the statutory offense. There was no error in rejecting the defendants' instruction concerning a "close case" as proffered at the second trial.

The statute does provide that evidence of the circumstances which are set forth "*is* probative with respect to the nature of the matter." (Italics added.) Defendants' contention that the provision is erroneous because the circumstances only *may* be probative in some cases, is answered by what we have said above. The circumstances are of general relevancy.

Defendants' argument that reference to "the nature of the matter" permits the use of evidence of circumstances for proof of issues other than social importance twists the meaning of "the matter" out of context. In any event, as noted in *Ginzburg,* it may throw light on the nature of the appeal which the material involved is designed to make. It was therefore not improper to reject defendants' instructions which conditioned use of evidence of circumstances of the presentation, displays and sale upon prior proof beyond a reasonable doubt of the other two statutory factors—appeal to a prurient interest and substantial excess over contemporary community standards of candor.

Defendants state that the statute erroneously directs the fact finders that evidence of the circumstances "can justify" the conclusion that the matter is utterly without redeeming social importance," because it will subject a distributor to punishment for salaciously advertising and selling what was prepared as a scientific treatise. Here again there must be establishment of the other factors set forth in the statute. (See *Kois v. Wisconsin* (1972) 408 U.S. 229, 232; and *Redrup v. New York* (1967) 386 U.S. 767, 770-771 [rehg. den. 388 U.S. 924].) On the other hand, it appears that the distribution of obscene matter cannot be concealed by a scientific veneer. (See *Hamling v. United States, supra,* 418 U.S. 87, 92-93 and 130.) "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication, . . ." (*Kois v. Wisconsin, supra,* 408 U.S. at p. 231.)

Defendants claim that the statute's reference to commercial exploitation offends the principle "that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." (*Ginzburg v. United States, supra,* 383 U.S. at p. 474.) The statute, as did the court in *Ginzburg,* distinguishes between mere commercialism, in the sense of a sale for profit, and the promotion for such sales by reference to the prurient appeal of the material being sold.

Defendants assert that the words "circumstances" and "exploited" render the statute vague, and fail to

give the distributor notice of what sort of conduct will subject his product to the incriminating inference. These attacks for vagueness are similar to those made against obscenity statutes themselves. Such arguments have continually been rejected. (See *Hamling v. United States, supra,* 418 U.S. 87, 117-119; *Bloom v. Municipal Court, supra,* 16 Cal.3d 71, 77-81; and *People v. Enskat, supra,* 33 Cal.App.3d 900, 908-910.) The statute details that it is proper to explore the circumstances, or conditions, facts and events accompanying (see Webster's New Internat. Dict. (3d ed. 1961)) the production, presentation, sale dissemination, distribution or publicity. If "circumstance" is a vague word, we must revise our instructions on circumstantial evidence. Commercial exploitation connotes publicity and advertising. (*Id.*) It may include, as here, the manner in which goods are displayed.

There is no merit to defendants' attack on the constitutionality of paragraph (2) of subdivision (a) of section 311.

B

The trial court did not restrict itself to using the provisions of the statute as a guide to the admission of relevant evidence, or as a counterweight to evaluate the sufficiency of the evidence. In each trial instructions were given paraphrased from the statute and the precedents upon which it is based.

At the first trial the court gave an instruction which was substantially in the language of the statute, fol-

lowed by close paraprahasing of language which has been quoted from *Ginzburg*.[4] (383 U.S. at p. 470.) Defendants complain that the court permitted the jury to consider the circumstances generally and then added, particularly with reference to commercial exploitation, whereas the statute only refers to the latter purpose. They disclose no error. The circumstances are relevant in any event, and in focusing on the commercial exploitation, the court left it open to the jury to find either way. There was no error from paraphrasing the statutory language.

Their objections that *Ginzburg* is only authoritative in mailing and advertising cases and in close cases have been reviewed above in connection with their attack on the statute. We reject such limitation and

[4]These instructions read:

"In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of production, presentation, sale, dissemination, distribution, or publicity and, particularly, whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, to which such evidence is entitled is a matter for the jury to determine.

"Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is on the sexually provocative aspects of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance.

"If the object of the work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered evidence that the work is obscene."

approve the phrasing of the second paragraph of the instruction.

The third paragraph again borrows from *Ginzburg*. There the opinion states, "Petitioners' own expert agreed, correctly we think, that '[i]f the object [of a work] is material gain for the creator through an appeal of the sexual curiosity and appetite,' the work is pornographic." (383 U.S. at p. 471.) Defendants justly complain that the trial court here substituted "obscene" for "pornographic." This tends to overlook the other two factors set forth in the statute. It is erroneous in that regard and also in referring to "the creator," who was not before the court, as distinguished from the defendants who were charged with distributing and exhibiting obscene matter. This error, however, was not prejudiciously erroneous. In view of the instructions given with respect to the three elements of the offense, the jury could not have been misled that the evidence offered on this score would satisfy all elements of the offense, or that the creators' rather than the defendants' acts were under scrutiny. As we have seen, the evidence of circumstances may be used to throw some light on the factor of appeal to prurient interest. No prejudicial error is found in connection with the last paragraph of the instruction.

At the trial of the second charges the court charged the jury in the language of the statute, added a caveat that merely engaging in business for profit would not evidence lack of redeeming social importance, and included further matter apparently predicated on

Ginzburg.[5] Since the court read from the statute verbatim, the defendants' principal attack is on the constitutionality of the statute and has been disposed of above. The reference to the circumstances of "production" may be considered erroneous in an action for exhibiting and distributing a finished product unless there is evidence to connect the exhibitor and distributor with the producer. (Cf. *Mishkin v. New York* (1966) 383 U.S. 502, 504-505 and 509-510 [rehg. den., 384 U.S. 934].) Here, however, there was no evidence concerning the manner in which the publications were originally produced, and the jury could not have been misled in either case by the use of the full complement of words found in the statute.

Defendants further object to the use of the phrase "sexually provocative aspects," and complain that a work may be sexually provocative and still have redeeming social importance. In the first case the reference was, as is found in *Ginzburg,* to "the purveyor's sole emphasis." (383 U.S. at p. 470.) In the second case, however, the phrase is related to "the sole emphasis of the matter." If the "matter" refers to the publication itself the instruction is overbroad. If the "matter" refers to the "circumstances of presentation and dissemination," referred to in the previous sentence, the instruction goes no further than to echo Mr. Justice Brennan, and tone down his reference to "that fact may be decisive in the determination of obscenity" to "that fact can justify a conclusion that the matter is utterly without redeeming social importance," thus echoing the statute. On reviewing the instructions as a whole we find no prejudicial error in the second trial.

[5]These instructions read:

"Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

"However, the mere fact, if it be a fact, that defendants were engaged in business for profit or that they made a profit, is not evidence in support of the conclusion that the matter is utterly without redeeming social importance.

"Circumstances of presentation and dissemination are relevant to determine whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the sole emphasis of the matter is on its sexually provocative aspects, that fact can justify the conclusion that the matter is utterly without redeeming social importance."

C

Defendants finally urge that the instructions were improper because there was no evidence of any circumstances showing commercial exploitation of the particular publications involved in this case. (See *People v. Jackson* (1954) 42 Cal.2d 540, 546-547; and *People v. Deloney* (1953) 41 Cal.2d 832, 842-843.) Significantly, in each of the foregoing cases, on which defendants rely, the court found there was evidence warranting the instruction. So here, the evidence which showed that the store contained nonprinted items of a sexual character, that there were 30 to 40 magazines in the store, displayed as were the pub-

lications involved, encased in plastic with a graphic sexual photo cut out and placed on the cover, and that there were substantial displays of sexually oriented books and magazines, warranted the giving of an instruction in accordance with the statute, at least with respect to the circumstances of presentation, sale, dissemination, distribution and publicity.

The further objection that the clerk was not responsible for the matters making up those circumstances misses the point. He was cognizant of them, and so is chargeable with knowledge that the matters involved were being commercially exploited for their prurient appeal.

No error is found with respect to the instructions under attack.

III

The statute applies to those who "knowingly" distribute or exhibit obscene matter. (Pen. Code. § 311.2.) Since November 10, 1969 "knowingly" has been defined as "be aware of the character of the matter." (*Id.*, § 311, subd. (e); Stats. 1969, ch. 249, § 1, p. 598.) The amendment was apparently made to bring the statute in accord with *Mishkin v. New York, supra,* 383 U.S. 502. There the court stated: "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. The New York definition

of the scienter required by § 1141 amply serves those ends, and therefore fully meets the demands of the Constitution. [Citation.]" (383 U.S. at p. 511, fn. omitted.) The New York definition referred to was that found in *People v. Finkelstein* (1961) 9 N.Y.2d 342, and quoted in *Mishkin* as follows: "'A reading of the statute [§ 1141] as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised . . . .'" (383 U.S. at p. 510, fn. omitted, quoting from 9 N.Y.2d at pp. 344-345. See also *Hamling v. United States, supra,* 418 U.S. 87, 119-124; *Ginsberg v. New York* (1968) 390 U.S. 629, 543-645 [rehg. den., 391 U.S. 971]; *People v. Enskat, supra,* 33 Cal.App.3d 900, 915; *People v. Adler* (1972) 25 Cal.App.3d Supp. 24, 36-37 [vacated, 413 U.S. 912]; *People v. Pinkus* (1967) 256 Cal.App.2d Supp. 941, 948-950; and *People v. Campise* (1966) 242 Cal.App.2d Supp. 905, 914-915.) The court further indicated (*id.*) that such knowledge of the character of the material satisfied the requirement of *Smith v. California* (1959) 361 U.S. 147 that an ordinance making it unlawful for any person to have an obscene writing in his possession in a bookstore is unconstitutional insofar as it attempts to impose criminal liability on the bookseller without establishing his knowledge of the contents of the book. (361 U.S. at pp. 153-155. See also *People v. Wepplo* (1947) 78 Cal.App.2d Supp. 959, 965-967.)

A

In the first action the jury was charged as set forth in the margin.[6] A similar instruction was given at the trial of the second action.[7] Defendants attack the first instruction because by use of the phraseology "it need only be established" the court "played down" the requisite of knowledge. The choice of words is unfortunate, but we cannot say it was prejudicial. The jury knew that the defendants were charged with "willfully, unlawfully and knowingly" distributing and exhibiting the obscene matter, and that the statute read "knowingly." They were properly charged with respect to the burden of proof on the prosecution, and the necessity of proving every element of the offense. There was no prejudicial error from the manner in which the instruction was phrased.

There is no merit to the contention that the court erred in advising the jury that it was unnecessary to

[6]This instruction read: "In regard to the requirement of 'knowledge,' as set forth in these instructions, I instruct you that it need only be established that the defendants were aware of the character of the matter in question. It need not be established that they had come to a judgment that the matter was legally obscene. Nor is direct evidence that the defendants have personally perused the work in question necesssary. For knowledge may be established by circumstantial evidence."

[7]This instruction read: "In regard to the requirement of 'knowledge,' as set forth in these instructions, I instruct you that it must be established that the defendants were aware of the character of the matter in question. It need not be established that they had come to a judgment that the matter was legally obscene. Nor is direct evidence that the defendants have personally perused the work in question necessary. For knowledge may be established by circumstantial evidence.

"Knowledge of the character of the items here cannot be inferred merely from the fact, if you find it to be a fact, that the defendant sold the items."

establish that the accused had knowledge that the material was "legally" obscene. Nor was it error to refuse instructions that the defendants would have to have knowledge not only of the character of the material, but also knowledge of the standards of candor in the community, of the prurient appeal of the publications and of the fact it had no redeeming social value. (See *Hamling v. United States, supra,* 418 U.S. 87, 119-124.) There the court stated, "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. § 1461 nor by the Constitution." (418 U.S. at pp. 123-124.)

Nor is there merit to the contention that knowledge may not be proved by circumstantial evidence. In *Smith v. California, supra,* the court tempered its ruling with the following statement: "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (361 U.S. at p. 154.)

The jurors were properly told that sex and obscenity were not synonymous.

B

Defendants attack the evidence as insufficient to establish even knowledge of the contents of the pub-

lication. In these cases there was the evidence concerning the appearance of the stock in trade of the store, the fact that one defendant was the store owner and the other a clerk, that Castner and Kuhns both answered a question as to the contents of the books, and that the books had pictures from the contents attached to the covers. The decision of the jury is supported by substantial evidence. We cannot say on appeal that the jury were required to find that the circumstances indicated that they should have inferred as a "rational conclusion" that the defendants had never read the publications.

There was no error in the instructions on the subject of knowledge, nor lack of proof thereof.

IV

At all times material in this case section 311.2 of the Penal Code had a provision exempting a motion picture operator or projectionist without a financial interest in his place of employment.[8] In 1975, effective January 1, 1976, a new subdivision exempted employees of a licensed employer under certain condi-

[8]Subdivision (b) of section 311.2 provided and provides: "(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed."

tions.[9] Defendants contend that the former section discriminated against clerks and favored projectionists, and that the adoption of the new subdivision relieves the defendant clerk from criminal responsibility, or, if not, preserves an unconstitutional discrimination. They also assert that section 311.2, both before and after its amendment, discriminates against the defendant owner.

The contention that the projectionists' exemption renders the statute unconstitutional because it then violates the equal protection clause has been answered in *Gould v. People ex rel. Busch* (1976) 56 Cal.App.3d 909, as follows: "It would be academic to analyze whether section 311.2 falls in the category of 'economic' or 'fundamental interest' or hybrid, and which standard should apply. We hold, applying the stricter standard, that the exemption of projectionists is valid and does not violate the equal protection clause because it tends to promote rather than inhibit dissemination of speech as protected by the First Amendment which constitutes a compelling state interest justifying the classification." (56 Cal.App.3d at p. 920. See also *People v. Haskin* (1976) 55 Cal. App.3d 231, 240-241; and *State v. J-R Distributors, Inc., supra,* 82 Wn.2d 584, 603-604. Note *People v.*

[9]Subdivision (c) of section 311.2, as added effective January 1, 1976, provides, "(c) Except as otherwise provided in subdivision (b), the provisions of subdivision (a) with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter."

Stout, supra, 18 Cal.App.3d 172, 176-177.) We note the exemption only applies to a projectionist, otherwise qualifying, who exhibits, or possesses with intent to exhibit, any obscene matter. Since obscene matter, by definition, is denied the protection of the First Amendment (see *Miller v. California, supra,* 413 U.S. 15, 36), there is no constitutional issue involved in the classification other than the equal protection guaranteed by the Fourteenth Amendment.

For the reasons stated above we also conclude that the addition of subdivision (c), insofar as it may be applicable to this case, is a proper exercise of the Legislature's right to classify regulatory statutes. (See *Adams v. Superior Court, supra,* 12 Cal.3d 55, 60-63.)

The new provisions exempt an employee who exhibits or possesses with intent to exhibit any obscene matter if he does so in the scope of his employment, and the other conditions set forth in the statute exist. Defendant clerk contends that he is entitled to the benefit of the new exemption because it abolishes the crime of which he was convicted. (See *Bell v. Maryland* (1964) 378 U.S. 226, 230-232; *In re Dapper* (1969) 71 Cal.2d 184, 188 [cert. den., 397 U.S. 905, rehg. den., 398 U.S. 954]; *In re Estrada* (1965) 63 Cal.2d 740, 742-746; *Spears v. County of Modoc* (1894) 101 Cal. 303, 305-307; *Weissbuch v. Board of Medical Examiners* (1974) 41 Cal.App.3d 924, 929; and Witkin, Cal. Crimes (1975 Supp.) § 17A, pp. 20-22.) On the other hand section 9608 of the Government Code expressly provides as follows: "The termination or suspension (by whatsoever means effected) of any

law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information, and punishment is expressly declared by an applicable provision of law." In *Sekt v. Justice's Court* (1945) 26 Cal.2d 297 [cert. den. (1945) 326 U.S. 756] it was suggested that the provisions applied to prosecutions for offenses which were misdemeanors under state law. (26 Cal.2d at pp. 300-303. See also *People v. Orozco* (1968) 266 Cal.App.2d 507, 515.) If so, the prosecution of the clerk under the statute may continue. (See *Sekt v. Justice's Court, supra,* 26 Cal.2d 297, 300; *People v. McNulty* (1892) 93 Cal. 427, 436-442 [app. dism. (1893) 149 U.S. 645]; Pen. Code, § 3; and Witkin, *op. cit.* (1963). Cf. *Bell v. Maryland, supra,* 378 U.S. 226, 232-237; *In re Estrada, supra,* 63 Cal.2d 740, 746-748; and Witkin, *op. cit.* (1975 Supp.) § 35, p. 47.)

It is unnecessary to explore the foregoing principles to determine their application to the cases under review. The charges in each trial were in the conjunctive. It was charged that the clerk "did wilfully, unlawfully and knowingly distribute *and* exhibit obscene matter to others." (Italics added.) The verdict in the first case was likewise in the conjunctive, and those for the two offenses charged at the second trial found the clerk guilty in that he "knowingly distributed obscene matter." Since the new statute does not exempt an employee who engages in such conduct, the clerk has no standing to claim relief under the amendment

V

The claim that the evidence is insufficient to sustain the conviction of the clerk at the first trial for distributing obscene matter is not borne out by the record. It is alleged that his sole activity in connection with the publication "Response," involved in the first charge, was to obtain a copy of the magazine from the store's stock, and answer a question about the magazine, that with "Animal Lovers" all he did was to read the price off the book, and that with "Sex and the Teenager" his sole participation was to place the book in a paper bag. In *State v. J-R Distributors, Inc., supra,* the court upheld the dismissal of the clerk who was charged with aiding and abetting the sale of the obscene material. The court characterized him as a "magazine wrapper . . . not a clerk," and concluded, "One does not aid, and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed. [Citations.] Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime. [Citations.]" (82 Wn.2d 584, 592-593.)

Here it was stipulated that defendant Castner was a clerk in the store. In the first case the clerk took the money from the officer and secured an unmutilated copy of the publication the officer had selected by the displayed "cover picture." When the officer complained that it did not appear the same, the clerk manifested his knowledge of the contents of the magazine by

advising the purchaser that the picture displayed would be found inside. The clerk handed the money over to the manager who returned the change to the counter. That evidence together with the the clerk's obvious familiarity with the merchandise brazenly displayed in the store was sufficient to sustain his conviction of distributing on the first charge.

The evidence with respect to the clerk's participation in the sale of "Animal Lovers" on January 7, 1971 is not so incriminating. The officer stated that he went into the store and "had a small discussion" with the owner and the clerk who were seated on two stools behind the cash register on the front counter. He attempted to engage them in conversation to secure admissions that could be used by the declarant. The officer's remarks were addressed to both persons seated at the counter, but the only reply was elicited from the owner. The officer, who stated that he wanted a book that depicted animals having different sexual activities with people was told (presumably by the owner) that they would not talk about the contents of the books they had on display. The owner did point out an area in the store. The officer went to the area, picked up a magazine called "Animal Lovers" and asked the owner if it were "a one-of-a-kind" magazine. The owner stated there were other books of that type in the store and pointed to an area in the store. After the officer went to that area, the owner left his stool and walked by to the left of the clerk, and ultimately leaned over the counter, looked at the area where the officer was standing, pointed to a

book labeled "The Animal Lovers" and spoke the name of the title. When the officer returned to the counter with the book which was wrapped in plastic and had a picture on the cover, the owner told him, in answer to his inquiry, that the picture was taken directly from the book, and that the disfigured display copy would be replaced by an identical copy with the picture in it.[10] There was no one else at the counter, and the clerk who was just sitting there, rubbing shoulders side by side with the owner, appeared to be following the conversation. The owner

[10]In an attempt to impeach the officer's testimony that he had asked for a book showing sex between humans and animals, defense brought out on cross-examination that that fact was not mentioned in the officer's report. On redirect, over the defendants' objection, the court permitted the witness to read certain portions of the report to rehabilitate his former testimony and rebut the inference that such testimony was of recent fabrication. The portion read did not contain any reference to the officer's original inquiry. It stated, "The reporting officer entered the business and began (as did the other customers in the store) observing the numerous magazines and books. The reporting officer found on the shelf at the far left-hand wall of the business a magazine entitled Animal Lovers. This magazine was taken up to the counter and the subject Castner [the clerk] above was asked if it could be taken from a clear plastic container so that the contents could be observed by the reporting officer. Mr. Castner stated that the books were to be sold in the form they were in. The reporting officer continued to observe the racks and stands for some minutes and returned and asked if the magazine the reporting officer had was a one-of-a-kind magazine." The report then did corroborate the witness' testimony concerning the owner's subsequent action in guiding the officer to "Animal Lovers."

When the defendants moved to strike the testimony the court denied the motion, but did charge the jury that the portion of the report read was admissible only to negate, as might be determined by the jury, any inference of recent fabrication.

The portion relating to the clerk was improperly admitted as it impeached, not rehabilitated, the prosecution's own witness on a matter in which he had testified favorably to that defendant. In any event, under the court's ruling, it could not be used to establish the truth of the matter asserted against the clerk.

took the display copy, replaced it with another copy, and gave the latter copy, which the officer produced in court, to him. The officer secured two other books, and the clerk read off the prices of the books to the owner, who rang them up on the cash register, took the officer's money and gave him change. The officer testified he thought the clerk placed the books in the bag and handed them to him.

In response to the defendants' objection the court instructed the jury that the conversations, in which the clerk did not participate, could only be used against the owner. There is a failure to establish that the clerk participated in the exhibition and distribution of "Animal Lovers" other than to read off the price and place the book in a paper bag. That evidence alone cannot sustain his conviction of distributing "Animal Lovers."

With respect to the book "Sex and the Teenager," a second officer testified that on February 4, 1971, he entered the bookstore, and that, without conversing with the owner or clerk, who were both present, he selected the book from where it was displayed, and took it to the counter where the cash register was located. He stated that without any conversation between himself and the owner or clerk, the owner picked up the book, went to a file cabinet, returned with another copy of the book, stated the price, received money from the officer and gave him his change. The sole testimony concerning the clerk indicates that he was standing side by side with the owner behind the counter, and that he took the second book when it was

handed to him by the owner, put it in a paper bag and taped the bag closed.

It was stipulated that on January 7 and February 4, 1971, the defendant, so identified, was a clerk in the bookstore, and that the other defendant was a co-owner of the store.

In *People* ex rel. *Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, the court concluded: "We are aware of no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene. Indeed plaintiffs have directed our attention to no such precedents, have presented nothing to countermand or distinguish the authorities referred to above, and at oral argument stated they could find no authority justifying the closing of bookstores in such circumstances. While we have concluded that a court of equity, having determined particular magazines or films to be obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, we emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution. [¶] We therefore hold that abatement in the present action must be directed to particular books or films which have

been adjudged obscene following a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed." (17 Cal.3d at p. 59.)

In our opinion by parallel reasoning a prosecution for distributing obscene matter must be directed at those who are in some way shown to be responsible for the distribution of the obscene matter. Even before the enactment of the present exemption (Pen. Code, § 311.2, subd. (c)) mere employment in a store purveying obscene material was not a criminal offense. The assistance which the prosecution proved the clerk rendered in those two instances, packaging the goods already sold to the customer, does not rise to the dignity of aiding or abetting the already completed criminal act. (*State v. J.R. Distributors, Inc., supra,* 82 Wn.2d 584, 590-595.)

The judgment in actions 24035 and 24143 must be reversed.

VI

Finally, defendants contend that the material involved is not obscene when subjected to independent review in a constitutional sense. (See *Miller v. California, supra,* 413 U.S. 15, 25; and *Zeitlin v. Arnebergh, supra,* 59 Cal.2d 901, 910.) In *Bloom v. Municipal Court, supra,* the court laid down the following test: "Having previously denied hearing in *Enskat* [*People v. Enskat, supra,* 33 Cal.App.3d 900], we now expressly approve that decision. Section 311 has been and is to be limited to patently offensive representations or descriptions of the specific 'hard

core' sexual conduct given as examples in *Miller I,* i.e., 'ultimate sexual acts, normal or perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals.' (413 U.S. at p. 25. . . .) As so construed, the statute is not unconstitutionally vague." (16 Cal.3d at p. 81.)

We have no hesitancy in concluding that the material the subject of these appeals falls within the foregoing description.

The judgments of the municipal court in actions numbered 24014, 24015, 24034 and 24142 are affirmed, those in actions numbered 24035 and 24143 are reversed.

Sims, J.

Molinari, P. J., and Elkington, J., concurred.

Appendix "B"

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Nov. 4, 1976

I have this day filed Order—Hearing Denied.

In re: 1 Crim. No. 14,439 People vs. Kuhns and Castner.

Respectfully,

G. E. Bishel, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-970

EARL KUHNS and RICHARD CASTNER,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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Subject Index

Table of Authorities Cited

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OPINIONS BELOW

Petitioners seek review of a judgment entered by the California Court of Appeal, First Appellate District, Division One, entered in the above-entitled case on September 8, 1974, and reported at 61 Cal.App.3d 735, 132 Cal.Rptr. 725.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to Title 28, United States Code section 1257(3).

STATEMENT OF THE CASE

On February 4 and 14, 1971, amended complaints were filed in the Municipal Court of the Santa Cruz County Judicial District, County of Santa Cruz, State of California, charging each petitioner with three counts of violation of California Penal Code section 311.2 (distribution and exhibition of obscene matter, a misdemeanor). Petitioners entered pleas of not guilty to the charges.

The charges resulted in two separate jury trials. The first trial, which took place in May, 1971, concerned the magazine "Response, the Photo Magazine of Sex for Women". As a result of the convictions in this trial, petitioner Kuhns received a sentence of 90 days in the county jail, one day suspended, and was fined $1,250.00 Petitioner Castner was sentenced to 40 days in the county jail and was fined $625.00. The second trial took place in September and October, 1971, and involved two books entitled "Animal Lovers" and "Sex and the Teenager". As a result of these convictions, petitioner Kuhns was sentenced to 180 days in the county jail, one day suspended, sentences to run concurrently, and fined $2,500.00 ($1,250.00 on each count). Petitioner Castner was sentenced to 90 days in the county jail, sentences to run concurrently, and fined $1,250.00 ($625.00 on each count). Petitioners filed notices of appeal and were admitted to bail pending appeal.

On November 9, 1972, the Appellate Department of the Santa Cruz County Superior Court affirmed the judgments of conviction. Petitioners remained on

bail, however, while they filed a petition for certiorari before this Court. Following the decision in *Miller v. California,* 413 U.S. 15 (1973), the petition for writ of certiorari was granted, the judgment was vacated, and the case was remanded to the Appellate Department of the Santa Cruz County Superior Court for further consideration in light of *Miller v. California, supra.*

Upon reconsideration, the Appellate Department of the Santa Cruz County Superior Court once again affirmed the judgment. Once again, petitioners sought a writ of certiorari before this Court. That petition was denied on the ground that the judgment which petitioners sought to have reviewed was not by the highest state court in which a decision could be had as required by 28 U.S.C. §1257. *Kuhns v. California,* 419 U.S. 1066 (1974).

Upon remand to the Appellate Department of the Santa Cruz County Superior Court, petitioners moved for Recall of the Remittitur, Relief from Default, and to Vacate the Judgment. On June 3, 1975, an order was filed in the Superior Court by which the motions were granted. By the same order the cause was certified for transfer to the California Court of Appeal, First Appellate District, pursuant to the provisions of California Penal Code section 1471, and California Rules of Court, Rules 62 and 63. A decision in the matter was rendered by Division One of that court on September 8, 1976. *People v. Kuhns,* 61 Cal.App. 3d 735, 132 Cal.Rptr. 725 (1976). By that decision all convictions as to petitioner Kuhns were affirmed.

Conviction arising from the trial which took place in May, 1971, as to petitioner Castner was also affirmed, but the convictions arising from the trial which occurred in September and October, 1971, were reversed on the ground that there was insufficient evidence to demonstrate that petitioner Castner had actually participated in the distribution of the obscene matter. A petition for hearing in the California Supreme Court was denied on November 4, 1976. The instant petition for writ of certiorari followed.

STATEMENT OF THE FACTS

1. The first trial (May, 1971)

Lieutenant Charles Scherer of the Santa Cruz Police Department testified that at approximately 12:00 p.m. on January 2, 1971, he entered Frenchy's K & T Bookstore in the City of Santa Cruz (RT 54-55). Petitioners Kuhns and Castner were behind the counter in the store. Several customers were also in the store (RT 54-55). Against one wall of the store was a display containing 30 to 40 magazines and paperback books, which were each covered with clear plastic and had pictures cut out and pasted on what would otherwise be the covers of those books or magazines. The officer selected a book and bought it to the sales counter. The picture pasted on its cover depicted, in the lieutenant's words, "the lower portion of a male body with a female leaning backwards committing an oral copulation on the other male that was standing over." ((RT 59:2-6).

The lieutenant placed the magazine on the sales counter along with a $20.00 bill. Petitioner Castner took the magazine, went to a file cabinet, opened a drawer and removed a magazine from it. This magazine did not have the same picture on its cover. The lieutenant called this to Castner's attention, and complained that it was a different book. Castner replied that it was the same book that the lieutenant had selected and that he could find the picture which was on the cover of the display copy inside the other magazine. As this was occurring, Kuhns, who had been standing alongside Castner near the cash register, received the $20.00 from Castner and changed it, returning $9.50 to the lieutenant (RT 59-60, 65-66).

The lieutenant described some of the store's adornments at the time of his purchase of the magazines as follows:

> "On the wall were various descriptive or described type male penises in colors, short and large in diameter, others long. On top of the counter, there was what is commonly known as French ticklers. Behind or in the display cabinet, there was battery-operated vibrators, again in the form of a male penis, artificial rubber-type female vaginas, water-type, artificial Spanish fly." (RT 79:10-16).

After the lieutenant left the store, he examined the magazine which he had purchased and found that the photograph in question appeared at page 7 of the magazine (RT 67). The magazine itself, entitled "Response, the Photo Magazine of Sex for Women,

Volume I, No. 1" was admitted into evidence (RT 123), and read to the jury (RT 127-128).

The People called Sergeant Henry Petroski of the Los Angeles Police Department, who qualified as an expert witness on the issue of customary limits of candor in the description of sexual matters in the State of California. He testified that the magazine in question, taken as a whole, goes substantially beyond the customary limits of candor in the description and representation of sex and nudity (RT 172).

Louis A. Noltimer, M.D., a psychiatrist testifying as an expert witness, stated that, in his opinion, the magazine, taken as a whole, appealed to prurient interest (RT 294), and was utterly without redeeming social importance (RT 296). Dr. Neal Blumenfield, another psychiatrist, testifying for the defense, concluded that, in his opinion, the magazine, taken as a whole, did not appeal to prurient interest, and possessed redeeming social importance (RT 392-393, 395, 410).

2. The second trial (September and October, 1971)

Officer Kusanovich of the Santa Cruz Police Department entered the Frenchy's K & T Bookstore on January 7, 1971, where he observed petitioners standing behind a counter with a cash register on it. The officer unsuccessfully attempted to engage petitioners in conversation, seeking admissions from them (RT 50). The officer indicated that he wanted a book involving animals and humans (RT 28).

Officer Kusanovich looked around the store and selected a book which appeared to concern animals and humans entitled "Animal Lovers". The book was completely wrapped in a clear plastic covering, and had a photograph pasted on what would otherwise have been the cover of the book. The photograph depicted a dog with its mouth in the area of a woman's sexual organs (RT 31). The officer took the book to the counter and asked petitioner Kuhns if the photograph on the front of the book was from the book, or if there were pictures like that in the book. Petitioner Kuhns replied that the photograph was taken directly from the book. The officer inquired if the book he had was going to be disfigured by having pictures torn from it. Petitioner Kuhns stated that it was to be replaced by a book identical to the display copy. Petitioner Kuhns then took the book from the officer and gave him another copy which the officer purchased for $15.00 (RT 31-33). After purchasing the book, the officer checked it and found the picture which had been pasted on the cover at page 98 of the book (RT 41).

Officer Bertuccelli of the Santa Cruz Police Department testified that on February 4, 1971, he entered the bookstore and purchased the book "Sex and the Teenager". The officer stated that when he took the book from the shelf it was covered in cellophane with a picture underneath the cellophane. He stated that the picture depicted an act of oral copulation between a man and a woman (RT 67). The officer took the book to the counter and placed it on the

counter. Petitioner Kuhns picked the book up and went to a file cabinet located behind the counter area. Kuhns returned with another copy of the book which he handed to petitioner Castner who placed it in a paper bag and taped the bag closed. The officer stated that the book which he purchased did not have the photograph on the cover (RT 68-69).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The issue of whether the magazines in question are obscene was presented to the jury under State statutes and instructions by the court which complied fully with the provisions of the United States Constitution. Further, the California Court of Appeal correctly concluded that any error which might have occurred by virtue of instructions on the production of the matter was clearly harmless. Nor is there merit to petitioners' claim that California's "projectionist exemption" is violative of the guarantee of equal protection.

ARGUMENT

I

THE CALIFORNIA COURT OF APPEAL CORRECTLY CONCLUDED THAT THE JURY WHICH CONVICTED PETITIONER WAS PROPERLY INSTRUCTED ON THE DOCTRINE OF "PANDERING".

A. Circumstances of Production and Dissemination are Relevant in Determining Whether the Questioned Material has Social Importance.

Petitioners contend that the jury instructions given in their cases, in conformity with California Penal Code section 311(a)(2), were unconstitutionally overbroad in that they subjected them to prosecution for the acts of another not on trial, and, further, that the instructions were unwarranted because there was no evidence of commercial exploitation sufficient to support them.

Petitioners argue that it was impermissible to allow the jury to consider evidence of the circumstances of production and dissemination in determining whether the books in question were obscene. They contend such evidence is constitutionally admissible only when the creator or producer of the material is on trial. This argument is based on the erroneous premise, resulting from petitioners' use of the verb "pandering" to characterizing their offense, that the circumstances of production and dissemination are elements of the substantive offense of which they have been convicted.[1] Respondent submits that circumstances of

[1]Petitioners' premise might have merit had they been convicted of violating California Penal Code section 311.5 which provides: "Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes the sale, distribution, or exhibition of matter represented to be obsence, is guilty of a misdemeanor."

production and dissemination *are* relevant on the definitional requirement of obscenity that the matter is utterly without redeeming social importance.

At the outset it should be recognized that the offense of which petitioners stand convicted has two elements: (1) the knowing sale of; (2) obscene matter. "Obscene matter" is defined by California Penal Code section 311(a) as: matter taken as a whole: (a) the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest; (b) which goes substantially beyond customary limits of candor in description or representation of such matters; and, (c) which is utterly without redeeming social importance. California Penal Code section 311(a)(2) recognizes that:

> "In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that the matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."

After the jurors in petitioners' cases were fully instructed on the three factors essential to a finding that the questioned material is obscene, they were further instructed:

> "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of production, presentation, sale,

dissemination, distribution, or publicity and, particularly, whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, to which such evidence is entitled is a matter for the jury to determine.

> "Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is on the sexually provocative aspects of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance.
>
> "If the object of the work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered evidence that the work is obscene."

Finding an opinion of Judge Learned Hand [*United States v. Rebhuhn,* 109 F.2d 512 (2nd Cir. 140)] persuasive authority, this Court concluded in *Ginzberg v. United States,* 383 U.S. 463 at 470-471 (1966), that evidence of the circumstances of presentation and dissemination of questioned material are relevant to determine whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was

the basis upon which it was traded in the marketplace or a spurious claim adopted only for the purpose of litigation. This Court concluded that where the purveyor's sole emphasis is on the sexually provocative aspects of his publication, that fact may be decisive in the determination of obscenity. The fact that the materials originate or are used as a subject of pandering is relevant to the application of the test of obscenity detailed in *Roth v. United States,* 354 U.S. 476 (1957), which is the basis of California Penal Code section 311. The fundamental notion that evidence of production and dissemination may serve to tip the balance toward a finding of obscenity first appeared in the separate opinions of Chief Justice Warren in *Roth v. United States,* 354 U.S. at 495 (concurring opinion), and *Jacobellis v. Ohio,* 378 U.S. 184, 201 (1964) (dissent). It took firmer root in the opinion of Mr. Justice Brennan (joined by the Chief Justice and Mr. Justice Fortas), delivering this Court's judgment in *Memoirs v. Massachusetts,* 383 U.S. 413, 420 (1966), before reaching full bloom in the majority opinion in *Ginzberg, supra.* The probative value of such evidence has been widely recognized by federal courts. *Cf. United States v. Palladino,* 475 F.2d 65, 70-71 (1st Cir. 1973); *Milky Way Productions, Inc. v. Leary,* 305 F.Supp. 288, 294 (S.D.N.Y. 1969) (three judge court) affirmed, 397 U.S. 98 (1970). Finally, and significantly, this Court recently rejected a challenge to these instructions which was based on an objection substantially the same as that raised by petitioners here.

"Finally, we similarly think petitioners' challenge to the pandering instruction given by the District Court is without merit. The District Court instructed the jurors that they must apply the three-part test of the plurality opinion in *Memoirs v. Massachusetts,* 383 U.S. at 418, and then indicated that the jury could, in applying that test, if it found the case to be close, also consider whether the materials had been pandered, by looking to their '[m]anner of distribution, circumstances of production, sale, . . . advertising . . . [and] editorial intent. . . .' App. 245. This instruction was given with respect to both the Illustrated Report and the brochure which advertised it, both of which were at issue in the trial.

"Petitioners contend that the instruction was improper on the facts adduced below and that it caused them to be 'convicted' of pandering. Pandering was not charged in the indictment of the petitioners, but it is not, of course, an element of the offense of mailing obscene matter under 18 U.S.C. § 1461. The District Court's instruction was clearly consistent with our decision in Ginzberg v. United States, 383 U.S. 463 (1961), which held that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied." *Hamling v. United States,* 418 U.S. 87, 130 (1974) (Emphasis added).

It must be recognized that here, as in *Hamling,* the jury was fully instructed that in order to convict they had to find, *beyond a reasonable doubt,* each of three factors which constitutionally define obscenity.

The questioned instructions were clearly consistent with the holding of *Ginzberg,* and merely indicated the probative value evidence of production and dissemination may have in determining social value.

California courts have held that California Penal Code section 311(a)(2) does not create a new substantive offense. *People v. Noroff,* 67 Cal.2d 791, 63 Cal. Rptr. 575 (1967). Since such evidence is instead relevant to the determination of the obscenity of the books themselves, there can be little doubt as to the applicability of the instructions in the instant case. Here there was the added element of evidence that petitioners attempted to "force public confrontation with the potentiality offensive aspects of the work." *Ginzberg, supra,* at 470. It is to be recalled that the display copies of the particular books accentuated the salacious aspects of the books by displaying pictures from inside on what would otherwise have been the covers of these volumes. Similarly, the display in close proximity to the magazine rack of assorted items such as imitation sexual organs is a circumstance relevant in determining the issue of obscenity. Thus, respondent submits there was ample evidence of commercial exploitation to justify the giving of the challenged instructions.

II

THE CALIFORNIA COURT OF APPEAL CORRECTLY CONCLUDED THAT ANY ERROR WHICH OCCURRED FROM INSTRUCTIONS REGARDING "CIRCUMSTANCES OF PRODUCTION" WAS CLEARLY HARMLESS.

Petitioners next contend that this Court should grant certiorari to set forth the proper standard to be applied when error occurs in the prosecution of an obscenity case. They base this contention on the finding by the California Court of Appeal that instructions which make reference to the circumstances of "production" may be considered erroneous in an action for exhibiting and distributing a finished product, unless there is evidence to connect the exhibitor and distributor with the producer. Having found such error, the court nonetheless concluded that there was no possibility that the jury could have been misled by such instructions. Petitioner speculates that the test applied to measure the weight of the error *might* have been the "state test" set forth in *People v. Watson,* 46 Cal.2d 818, 299 P.2d 243 (1956), as opposed to the more stringent test set forth in *Chapman v. California,* 386 U.S. 18 (1967).

We submit that the law is clear that the *Chapman* standard must be applied where the error is of Federal "constitutional dimension". Thus, depending upon the nature of the error in an obscenity prosecution, the standard to be applied measuring the weight of the error in a given instance might vary with the situation. However, it is also clear that the California Court of Appeal's conclusion was correct under either standard in this case. The logic of such a finding is

compelling. If, as found by the court, there was no evidence of the circumstances of production, then clearly the jury could not have looked to such circumstances on those instructions to petitioners' detriment. Petitioners, somewhat ambiguously, argue that the matter itself constituted evidence of the circumstances of production. If this is true, then we submit that there was evidence sufficient to justify the giving of the instruction, and, contrary to the finding of the California Court of Appeal, no error occurred at all. Under either circumstance, it is clear that any conceivable error which occurred by the giving of these instructions was "harmless beyond a reasonable doubt", thus satisfying the *Chapman* standard. Accordingly there is no merit to petitioners' contention that the instructions created ambiguity and confusion in the minds of the jury.

III

PETITIONERS WERE NOT DENIED THE EQUAL PROTECTION OF THE LAW BY REASON OF THE "PROJECTIONIST EXEMPTION" TO THE CALIFORNIA OBSCENITY STATUTES.

Petitioners argue that the "projectionist exemption" in Penal Code section 311.2(b), which provides that the basic proscription against the possession or printing of obscene matter with intent to sell or distribute is inapplicable to a "motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place

wherein he is so employed", violates the equal protection clause. It is alleged that the statute in some manner affects petitioners' exercise of their First Amendment rights. We are unaware, however, of any First Amendment right to possess obscene matter for purposes of sale or distribution.

California courts have strictly construed the term "projectionist". In *People v. Stout,* 18 Cal.App.3d 172, 95 Cal.Rptr. 593 (1971), the court held that a defendant who operated a projector was not exempt since he was the only person on the premises, took admissions money and generally supervised the operation on behalf of the owner. Petitioners have not demonstrated or alleged that they have occupied a similar status to that of a mere projectionist at Frenchy's K & T Bookstore.

The legislative judgment of the states in determining to attack some, rather than all, of the manifestations of an evil aimed at is normally given the widest discretion and benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964). The classifications herein are not inherently suspect, nor are they arbitrary. There are, of course, basic differences in the functions performed by the projectionists and bookstore clerks. Similarly, opportunities for examination of the character of the material vary between the two medias. For these reasons, we submit that the California Court of Appeal properly rejected petitioners' contention on this issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of ceriorari should be denied.

Dated, April 6, 1977

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